# The Italian President and the Security of the European Project

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In a previous post, I have argued that the recent decision of the Italian President of the Republic, Pierluigi Mattarella, to refuse to appoint as Finance Minister Paolo Savona, was constitutional. Soon after that initial post, other posts on this and other blogs have argued either in favour or against Mattarella's decision, either from legal or political perspective, or both. My argument is as follows: (a) the decision to refuse Savona's appointment is not only legal, but also legitimate, as confirmed by the legal-historical context, in which the Italian form of government has developed; (b) the reasons behind Mattarella's decision are deeply linked with the "security of the European project", a rationale which has been a constant feature of European integration. Yet conflicts and contradictions have been concealed for too long and should be addressed more directly.

## Pro and contra

Those who tend to be in favour of upholding the President's discretionary powers – see, for example, this statement published by some important Italian constitutional lawyers, and here, or here – maintain that the role of the President of the Republic cannot be reduced to "rubber-stamping" the initiatives and proposals of the Prime Minister.

Radical opponents of Mattarella's decision, instead, either contest the legality *tout court* of his move, by interpreting Article 92 restrictively, or claim that legality in this case does not coincide, or even conflicts, with legitimacy.

The first thesis can be labelled "textualist" or "formalist". This thesis fails in at least two respects. On the one hand, it speaks to a fictitious idea of "institutional neutrality", which does not correspond to the political life of institutions. The absolute neutrality of legal arrangements is illusory and never really achievable. On the other hand, it ignores or belittles both the legal-historical context in which the Italian Constitution was written and has evolved.

As can be seen in the Preparatory Work of the Italian Constituent Assembly, in particular as regards Articles 87-92 (enlisting some of the powers conferred on the President), "*The President of the Republic is the Head of State and represents national unity*" (Article 87 (1)). Importantly, he was qualified "*Head of State*" (despite some opposition in this sense), and, although the expression "*guardian of the Constitution*" was ultimately rejected, the intention was to reproduce exactly such role. As noted by Meuccio Ruini, Chair of the Committee of 75 experts who drafted the Constitution, the tasks of the President of the Republic were not supposed to be those of a mere "*executor*", but rather those of a "*moderator*" or "*coordinator*". His powers would not be easy to define through strict legal

criteria, because he would be above transient electoral majorities, to the extent of representing "*the unity, national continuity, the permanent force of the State*", a "*spiritual, more than a temporal authority*".

"*No one should be afraid of such powers*" – as noted by Ambrosini, another member of the Committee- "bec*ause he will not be able to exercise them arbitrarily or on his own (…)*" and "*(…) if the system does not works it explodes…It is necessary to avoid that the position of the Head of State is rendered unstable not only as a matter of law (…), but also as a matter of fact, and this is what we recommend to future Parliaments*". The anomaly and "incorrectness" lies thus not in the President's decisional power and final say, but, on the contrary, in the winning parties' attempt to interfere with his/her will and render the system unstable. After all, this is a remnant of the role of the monarch, as elaborated in the previous Constitution (the "*Albertine Statute*"). Yet, in order to avoid that excessive powers would be conferred on the Head of State with the additional risk of allowing the majority in Parliament to express its own representative, a "third way" was explicitly found. Such solution was to be half-way between US-style Presidentialism and the form of "*parlamentarisme absolu*" denounced by Carré de Malberg as regards the Third Republic in France (which partly inspired the configuration of the Italian President).

Of course, ambiguities inevitably surround the functions and symbolism of the President of the Republic. After all, Article 92 is very concise as regards the power of appointment. In fact, scholars, especially in the years immediately following the entry into force of the Constitution, argued that the President's role should be passive, detached from political games. This was a rather popular argument in the '50s and '60s. Yet, things changed. For example, one of the main proponents of this thesis (Galeotti) later changed of mind and conceded that this role could be more active. Over the years Presidents, depending on their personality and the circumstances, have: exercised moral suasion; interfered with decisions in the field of foreign policy; refused to sign bills they deemed unconstitutional, and taken upon themselves the task of influencing the composition of governments, especially during political crises and in light of the long-standing difficulty of the Italian Parliament to express a clear majority. In other words, the weakness of the Parliament has found a counter-balance in the stronger presence of the Head of State.

The second thesis (which can be defined roughly as "majoritarian") is in some respects akin to political constitutionalism, which tends to view the Constitution as primarily a political process, rather than a norm. From this perspective, the very concept of a "higher law" as a form of pre-commitment of a political community is rejected: instead, political equality, as every citizen's right to have his/her voice heard and respected (as confirmed, for example, by the right to vote and the principle of majority rule) becomes a condition of legitimacy. One of the outcomes of this is a general mistrust towards decisions by unelected bodies which either constrain or override decisions made by elected representatives (an argument sometimes known as the "counter-majoritarian difficulty"). This thesis fails to embrace fully the concept of "the political". Exceptional situations in which unelected organs, like the President of the Republic, may adopt decisions which tend to preserve the existing constitutional arrangement or the "interests of the Nation", are always possible. While this may perhaps sound undemocratic at first sight, it is a feature, which is associated with the self-reinforcing and self-protective nature of constitutional systems.

More nuanced approaches, while recognising both the existence of a certain margin of discretion and the aforementioned need to foster public debate, still point out that this mindframe might either turn into a "straitjacket", thus resulting into forced membership (the "counter-hegemonic" argument), or facilitate the emergence of a constitutional convention in the sense of an increased role of the President (the "gradualist" argument). Leaving aside the "gradualist" argument (which is connected to what observed above), the following section focuses on the "counter-hegemonic" argument.

## The security of the European project

As a matter of fact, it is true that supporters of the European project find it hard to come to terms with (or solve) Rodrik's paradox: the impossible co-existence of national sovereignty, a functioning EMU, and democratic politics. Yet, the "counter-hegemonic" argument, at least in the version suggested in Verfassungsblog, does not address this paradox as such. Instead, it focuses on the following question: 'Can an economist critical of the current governance of the Euro be appointed as Minister of Finance of a Eurozone country?' and expresses the fear that a constitutional convention, 'according to which political parties or coalitions that are critical of the existing economic and monetary arrangements within the Eurozone cannot get into government', might have emerged. While these are important remarks, this argument tries to prove too much and falls into contradiction. First, as has been noted, this is primarily a matter of domestic, not EU constitutional law. Second, even as a matter of domestic law, arguing that relying on the mere wording of Article 92 would lead to the risk 'of conflating legality with legitimacy, suggesting the President should do what he is legally empowered to do. But 'may' obviously does not imply 'should'' misses the point – precisely because the President's intervention is in line with the constant trend of the material constitution towards an ever-stronger role of the Head of State.

Having said that, the "counter-hegemonic" argument correctly emphasises the worrying tension between freedom and coercion, which can be detected in EU constitutional law. Although the Italian crisis was a matter of domestic constitutional law, it inevitably affects the EU legal and political framework, because of the commitment towards the European project, which is enshrined in the Italian Constitution (Articles 11 and 117). As recently argued by some Italian scholars when commenting on the appointment of the Monti government (above all Antonio Ruggeri), the persistent state of crisis might have modified some of the traditional theoretical categories employed to describe the "constitutional State", to the extent that governments would now have to seek not only a formal vote of confidence from Parliament, but also an informal vote from the EU and the financial markets.

The tension between freedom and coercion is here particularly visible and is expressed by what I call the "security of the European project", a meta-constitutional rationale which has been historically developing through discursive practices detectable both at the national and the EU level. As EU integration reaches a more advanced stage, its conflictual elements, which have been previously concealed, come to the surface- and, together with them, all the contradictions that affect the EU liberal model. Security is thus both the

presupposition of, and a threat to, the project of European integration and such feature can be observed not only as regards the financial and economic crisis, but also in relation to the refugee crisis, the constitutional identity crisis, the rule of law crisis and Brexit.

As a result, it is not correct to depict the refugee crisis as a challenge for Northern Europe, and the financial crisis as a challenge for Southern Europe. Both equally affect the political and constitutional framework of the EU polity as a whole and should be addressed by bearing in mind that they touch upon the core of the current transnational integration mind frame. Crisis and security are intertwined and mutually reinforced concepts. However, when crisis turns into a permanent condition and security becomes self-referential, the premises and foundations of a polity are themselves questioned. To be sure, precisely the contradictions and conflicts are an inherent feature of constitutionalism. They have been ignored for too long. It is now time to address them through an open and public debate, keeping in mind the risk of "over-constitutionalisation" both at the EU and at the domestic level.

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